Supreme Court, U.S.
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No. 08-668

In The Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division 6

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the petitioner have a ripe takings claim under the Fifth Amendment of the United States Constitution:

- When the petitioner has applied only once for a project on the property;
- When no land use regulatory agency has made a final determination of the permissible uses of the petitioner's property; and
- When a regulatory agency has identified an alternative development project that it potentially could approve?

TABLE OF CONTENTS

Page

Statement 1

Argument 8

I. The *Penn Central* Test For A Taking Is Not A Part Of This Case 9

II. The Court Of Appeal Correctly Determined That Pratt's Taking Claims Were Not Ripe..... 11

A. Pratt's Takings Claims Are Not Ripe.... 11

B. Pratt Cannot Avoid The Lack Of Ripeness Of Its Claims 15

III. The Court Of Appeal Did Not Hold That The Absence Of Water On The Property Precluded A Taking 20

Conclusion 22

Appendix

California Public Resources Code section 30514 ..... App. 1

California Public Resources Code section 30519 ..... App. 5

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 9

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 19

Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800 (1976) 21

Florida Rock Indus., Inc. v. United States, 45 Fed.Cl. 21 (1999) 11

In re Waters of Long Valley Creek System, 599 P.2d 656 (Cal. 1979) 21

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 1, 12, 13, 14

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) ..... *passim*

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 8, 9, 10, 11

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 15

Williamson Planning Com. v. Hamilton Bank, 473 U.S. 172 (1985) 5, 12

Youakim v. Miller, 425 U.S. 231 (1976) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Cal. Pub. Resources Code § 30514, subd. (a).....7
Cal. Pub. Resources Code § 30519, subd. (a).....17
Cal. Pub. Resources Code § 30603 17
Cal. Pub. Resources Code § 30603, subd. (b).....2

STATEMENT

1. This Court has emphasized that a landowner's takings claim is not ripe until the land-use authorities have had an opportunity to exercise their full discretion to determine the permissible uses of property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Importantly, a takings claim is not ripe if the land-use authority has denied a substantial project but there remains some doubt whether it would accept a more modest submission or an application for a variance. *Id.* at pp. 618-621; *see MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 342, 353, fn. 9 (1986).

2. In 1973, the County of San Luis Obispo gave conceptual approval to petitioner Charles A. Pratt Construction Co., Inc.'s (Pratt) tentative subdivision map designated as Tract 308, Units I and II, in the Los Osos area on the Central California coast. Unit I contemplated subdividing 25 acres into 86 residential lots while Unit II was an 81-acre parcel that Pratt would subdivide into 149 residential lots. The County's conceptual approval was subject to a number of conditions. Thereafter, Pratt abandoned its attempt to develop Unit II. In 1989, after receiving approvals from the County and from respondent California Coastal Commission, Pratt recorded a tract map for the subdivision of Unit I into 40 residential lots. Petitioner's Appendix (App.) at pp. 2-4.

In 1990, Pratt applied for the first time to the County for a coastal development permit for Tract

1873, a proposal to subdivide 121 acres into 44 parcels. Pratt's proposal encompassed the 81 acres that had been Unit II plus an additional 40 acres that Pratt had acquired to hold as open space. In 1998, the County approved a coastal permit for Pratt, but a number of individuals and entities including the United States Fish and Wildlife Service, the California Department of Fish and Game, and the California Department of Parks and Recreation filed administrative appeals to the Coastal Commission. In 2000, the Commission denied Pratt's permit application because it was inconsistent with a number of policies of the County's certified local coastal program (LCP). App. at pp. 4-5.

Pursuant to the California Coastal Act, when the Coastal Commission reviews a permit application on appeal from a local government's action, the Commission applies the standards from the local government's LCP, which constitutes the land-use plan for that jurisdiction. Cal. Pub. Resources Code § 30603, subd. (b).

The Commission found that Pratt's project was inconsistent with many policies in the County's LCP. For example, the Commission found that a species of tree listed as threatened under the federal Endangered Species Act covered much, but not all, of Pratt's property and that the LCP mapped much, but not all, of Pratt's property as environmentally sensitive habitat. Because the LCP severely restricted development in such habitat, the Commission found that the project violated the LCP. In addition, the

Commission found that Pratt's project was not consistent with the policies of the LCP that protect visual resources. App. at pp. 10-13.

The Commission also determined that Pratt's property is located in an area where the LCP requires that water be provided from an on-site source rather than have a municipal water company provide water to the site. Pratt did not provide the Commission with any evidence of the amount of water that was available on-site. Also, the evidence before the Commission was that development in this area had resulted in an overdraft of the aquifer which provides drinking water in this region. App. at pp. 12-13, 14.

The Commission also concluded that Pratt's project did not conform to the regulations of the Central Coast Regional Water Quality Control Board (Regional Board), the agency that regulates water quality under state and federal law. Pratt proposed to use septic systems for sewage disposal. However, the Regional Board's regulations permitted the use of septic systems only on lots that were much larger that most of the lots in Pratt's proposed subdivision. Although it could have applied to the Regional Board for a permit, Pratt never did so. In its process, the Regional Board could require Pratt to reconfigure its project so that it conformed to the Regional Board's regulations for sewage disposal. That is, the Regional Board could require that Pratt increase the size of the parcels, obtain an exemption allowing the use of septic systems on smaller lots, or construct a small sewage treatment facility to serve the smaller lots.

Finally, in its review of Pratt's application, the Commission stated that the project alternative that the Planning Commission had approved, and that the County had reviewed in the environmental impact report, could potentially be approved. App. at p. 18. The Planning Commission alternative would allow Pratt a 41-lot subdivision with the lots between 10,000 and 20,000 square feet in size. This proposal clustered the development in the northwest part of the property adjacent to Pratt's previous subdivision and greatly reduced the impacts to environmentally sensitive habitat and to visual resources. However, that alternative did not address the infrastructure concerns (water supply and sewage disposal). Thus, the Commission was not in a position to review that alternative until Pratt had dealt with those issues.

3. Pratt sued the Commission alleging, *inter alia*, that the evidence did not support the Commission's decision. Pratt also alleged that if the courts upheld the Commission's decision, then there were no beneficial uses remaining for Pratt's property, resulting in an uncompensated taking. The trial court first found that the evidence supported the Commission's decision to deny Pratt a coastal permit. App. at p. 5.

In ruling on the Commission's partial summary judgment motion addressing Pratt's takings claims, the trial court determined that those claims were not ripe because, unlike the situation in *Palazzolo v. Rhode Island*, *supra*, Pratt potentially could develop 20 percent of its property and, in the absence of a further application, no one could determine what the

value of development would be. App. at pp. 32-33. The trial court also found that it would not be futile for Pratt to reapply because the Commission had identified an alternative project that it potentially could approve. App. at pp. 33-34.

4. The California Court of Appeal affirmed the judgment. The Court of Appeal held that the evidence did support the Commission's decision to deny Pratt's permit application. App. at pp. 10-16.

As to Pratt's takings claims, the Court of Appeal applied this Court's precedents such as *Palazzolo* and *Williamson Planning Com. v. Hamilton Bank*, 473 U.S. 172 (1985). Based on those precedents, the Court of Appeal determined that Pratt's claims were not ripe because:

- Pratt had applied only once to subdivide Tract 1873;
- Twenty percent of the property (about 24 acres) remained available for development after the Commission's denial of Pratt's application;
- The Commission had identified an alternative project that potentially could be approved; and
- Pratt had never submitted a plan to develop the remaining 24 acres.

Reviewing these facts, the Court of Appeal held that the Commission had not made a final determination of the extent of development that would be allowed on

Pratt's property. Therefore, Pratt's takings claims were not ripe. App. at pp. 16-21.

5. Pratt's petition mischaracterizes the record on several points. On three occasions in its petition, Pratt refers to the opinion of its appraiser that "the regulations could actually limit use of the subject 124-acre tract to as little as *1120 square feet*." Petition (Pet.) at pp. 3-4, emphasis in original; *see also* Pet. at pp. 8, 16 fn. 6. Pratt's reliance on its appraiser is improper for four reasons. First, the appraiser was referring to the effect of an action that the County took in 2004 – four years after the Commission's action on Pratt's permit application. In 2004, the County adopted an amendment to its LCP. Pratt claimed that when this amendment was coupled with the Commission's interpretation of the LCP, then Pratt potentially had only 1120 square feet remaining that it could develop out of the 24 acres that remained after the Commission's denial of a permit for Tract 1873. Of course, Pratt did not present this information to the Commission in 2000 when it considered Pratt's application for a coastal permit, and therefore this information is not a part of the administrative record for this case. App. at p. 39.

Second, the appraiser offered his opinion in a vacuum. Pratt never applied for a permit for a project to which the LCP amendment applied. Thus, Pratt's appraiser was speculating on the effect of that amendment.

Third, pursuant to California law, a local government's amendment of its LCP does not become operative until the Commission approves it. Cal. Pub. Resources Code § 30514, subd. (a). Here, the Commission never approved the LCP amendment, and that amendment never became operative.

Finally, in its appeal, Pratt did not present any issues relating to the County's action. Pratt put this information before the trial court in 2005 in two post-trial motions. Although the trial court denied both motions, Pratt never challenged those rulings on appeal. App. at p. 39.

Pratt also asserts on several occasions that because the Commission's application of the LCP left Pratt with only 24 acres, or about 20 percent of the parcel, that the Commission had reduced the value of the property by 80 percent. Pet. at pp. i, 16. Pratt's assertion is misleading. There is no evidence in the record that establishes the value of the 24 acres that remain available for development or the value of any development on that land. Nor is there any evidence establishing that the value of development is directly proportional to the overall size of the property. Thus, Pratt's conclusion that the Commission's action reduced the value of the property by 80 percent is speculation.

Pratt's contention also is disingenuous because the permit that Pratt asked the Commission to approve would have required Pratt to protect 80 acres (or nearly 65 percent of the property) as open space.

Moreover, Pratt acquired a large portion of its property (43 acres) for the express purpose of using it as part of the open space.

In any event, Pratt has never submitted an application seeking to develop those 24 acres, and it is only in the context of such an application that the extent of permissible development (and its value) can be determined.

ARGUMENT

In reviewing Pratt's takings claims, the California Court of Appeal applied this Court's precedents and determined that those claims were not ripe for judicial review. Rather than conceding that this is a classic ripeness case that does not warrant review, Pratt attempts to manufacture a *Penn Central* issue that this case does not present. Pratt asserts that this Court's review is necessary because the lower courts are confused about how to apply the *Penn Central* factors for determining whether the application of a regulation constituted a regulatory taking. However, here neither the state Court of Appeal nor the trial court applied those factors. Instead, they properly found that Pratt's takings claims were not ripe. Therefore, this case is not an appropriate vehicle for addressing the *Penn Central* factors.

I. The *Penn Central* Test For A Taking Is Not A Part Of This Case.

Pratt argues that the lower courts are confused about how they should apply the ad hoc test for a taking that this Court developed in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Pet. at pp. 3-4, 10-18. Setting aside the question of whether the lower courts actually are confused, this case does not present an appropriate vehicle to consider that question because neither the trial court nor the Court of Appeal applied the *Penn Central* test. Because the lower courts here determined that Pratt's taking claims were not ripe, they had no need to examine the *Penn Central* factors or to determine whether a regulatory taking had occurred.

This Court has long refused to decide in the first instance issues that the lower courts did not decide. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001), citing *inter alia*, *Youakim v. Miller*, 425 U.S. 231 (1976). Here, Pratt did not argue in its briefs before the Court of Appeal that the trial court had improperly applied *Penn Central*. Nor did Pratt ask the Court of Appeal to apply the *Penn Central* test. Instead, Pratt argued that its claims were ripe and that it was entitled to a trial at which it could present evidence on the *Penn Central* factors. Even a brief review of the Court of Appeal decision reveals that the court did not reach or apply the *Penn Central* test.

Pratt attempts to avoid this conclusion by mischaracterizing the Court of Appeal's opinion. Pratt claims that the Court of Appeal determined, as a matter of law, that there cannot be a taking when a government regulation prevents development of 80 percent of a landowner's property. Pet. at p. 15. Pratt is wrong. Nowhere in its decision did the Court of Appeal address or purport to determine whether a taking had in fact occurred here. Rather, that court's entire discussion of takings law was in the context of ripeness. And in that context, the Court of Appeal noted that even if Pratt were correct that the Commission decision prevented development of 80 percent of Pratt's property, that left 24 acres available for development, and that no one knew the amount of development that the County or the Commission might permit on that acreage. On that basis, the Court of Appeal concluded that this case was very different from *Palazzolo*. App. at pp. 20-21.

Pratt claims that because it is unable to develop 80 percent of its property, the Commission has reduced the value of the property by 80 percent. Pet. at pp. 15-16. However, as noted earlier, Pratt itself proposed to develop only 35 percent of the property. Moreover, Pratt did not argue this to the Court of Appeal – for good reason. Because the lower courts resolved Pratt's takings claims on ripeness grounds, they had no need to apply the *Penn Central* factors or to take evidence on what the value of development on the remaining 24 acres would be.

In distinguishing the facts in *Palazzolo* from those here, the Court of Appeal noted that "it is far from determined how much development can occur on Pratt's property." App. at p. 21. That certainly is true. In fact, there is absolutely no evidence in the record on the value of Pratt's property, the value of the 24 acres that Pratt potentially can develop, or the value of any development on those 24 acres.

Pratt also cites to the last decision in the *Florida Rock* series of cases and compares the 73.1 percent diminution in value there to Pratt's speculative claim of a loss of 80 percent in value here. Pet. at p. 16. However, in that case, the Court of Federal Claims actually applied the *Penn Central* factors to find that there had been a diminution in value of 73.1 percent that resulted in a taking. *Florida Rock Indus., Inc. v. United States*, 45 Fed.Cl. 21, 32-44 (1999). Neither the trial court nor the Court of Appeal applied those factors here nor did they determine whether a regulatory taking had occurred. Therefore, this case is not an appropriate vehicle to review any claim relating to *Penn Central*.

II. The Court Of Appeal Correctly Determined That Pratt's Taking Claims Were Not Ripe.

A. Pratt's Takings Claims Are Not Ripe.

This Court's jurisprudence regarding whether a takings claim is ripe for judicial review is well-established. In *Palazzolo v. Rhode Island*, *supra*, 533

U.S. at p. 618, this Court explained that "a takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue.'" It is only when the responsible agencies have made a final decision on the permissible uses of the property that the landowner or the judiciary can determine whether the regulation has deprived the landowner of all economically beneficial uses of the property or whether a non-categorical taking has occurred. *Ibid.*; *see also Williamson Planning Com. v. Hamilton Bank*, *supra*, 473 U.S. at p. 186.

Thus, a final and authoritative determination of the type and intensity of legally permitted development on the property is an essential prerequisite to a party's assertion of a regulatory takings claim. A final and authoritative determination is necessary because the courts cannot determine whether a regulation has gone too far until they know how far it goes. *MacDonald, Sommer & Frates v. Yolo County*, *supra*, 477 U.S. at p. 348.

In this case, the Court of Appeal looked to *Palazzolo* and determined that Pratt's takings claims were not ripe because no one knew how much development might be allowed on the 24 acres that were not environmentally sensitive. As the Court of Appeal noted, "Here, unlike *Palazzolo*, it is far from determined how much development can occur on Pratt's property." App. at p. 21. The Court of Appeal was correct.

Pratt submitted a single application for a permit to subdivide Tract 1873 that the Commission denied because the application was inconsistent with the applicable standard, the LCP. In denying the application, the Commission noted that there was an alternative lot configuration that addressed the habitat and view issues and that potentially could be approved, subject to review by other agencies with jurisdiction over the project. However, Pratt has never submitted any further application for development of the property. These facts present a typical example of a takings claim that is not ripe.[1]

Indeed, this case is similar to *MacDonald*. There the plaintiff submitted a single development plan to divide his property into 159 residential parcels, and the county denied the application because it was inconsistent with its general plan. *MacDonald, Sommer & Frates*, *supra*, 477 U.S. at pp. 342-343. The plaintiff sued alleging that the county was restricting the property to open space by denying all development plans and that the permit denial appropriated

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[1] San Leandro Rock Co, Inc.'s amicus brief does not address the Court of Appeal decision in this case. Rather, San Leandro Rock asserts that final action on a development application should not be a necessary prerequisite of ripeness. San Leandro Br. at pp. 16-22. While San Leandro's issue might be of interest in some circumstances, this case does not present those circumstances. Pratt did apply for a permit, and after the Commission's denial, there is a complete lack of certainty about the scope and value of development of Pratt's property.

"the entire economic use" of the property. *Id.* at p. 344.

Notwithstanding those allegations (which are similar to Pratt's allegations here), the Court found the plaintiff's takings claim was not ripe because the plaintiff had not yet received the County's final determination regarding the actual scope of permissible development. There, as here, the government's decision left open the possibility that it would allow some development, and that possibility meant that the plaintiff's takings case was not ripe. *Id.* at pp. 351-353. The Court noted that the rejection of a large development plan did imply that a less ambitious plan could not be approved. *Id.* at p. 353 fn. 9.

Finally, Pratt never addressed the unresolved infrastructure issues for the project. That is, Pratt contemplated using septic systems to treat the sewage that development of Tract 1873 would create. In order to use septic systems, Pratt needed a permit from the Regional Board but never applied for one. However, if Pratt applies for that permit, the Regional Board can require that Pratt alter the configuration of the subdivision. Thus, at the time the Commission considered Pratt's application for Tract 1873 (and even now), neither Pratt nor the Commission knew what the final configuration of the subdivision would be. Nor did Pratt present evidence to the Commission on the availability of on-site water. In the absence of information on water supply and sewage disposal, no one can know the extent of permissible development on the property.

B. Pratt Cannot Avoid The Lack Of Ripeness Of Its Claims.

Pratt posits several arguments in an attempt to avoid the conclusion that its takings claims are not ripe. Pratt argues that the Commission's reasons for denying a permit to subdivide Tract 1873 will not change and then concludes that there is no need to waste time on additional applications. Pet. at pp. 24-25. What Pratt ignores is that even if the Commission's reasons for denying a permit to subdivide all of Tract 1873 will not change, Pratt still has about 24 acres that it potentially can develop. Pratt has not applied for a permit for a subdivision or any other development focused on that portion of the property. Moreover, the Commission identified an alternative project for that portion of the property that might be approved thus indicating, as the Court of Appeal noted, the Commission's willingness to consider alternatives. App. at p. 18. The record in this case establishes that the Commission has not closed the door to development on this property.[2]

Pratt argues that its takings claim is ripe because it spent many years before the County and

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[2] Pacific Legal Foundation argues that Pratt's takings claims are ripe as to the 80 percent of the property that is sensitive habitat. PLF Br. at p. 11. This Court has never allowed a party to divide its parcel in such a manner. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 330-331 (2002) [taking jurisprudence does not divide a single parcel into segments].

because it submitted an environmental impact report that reviewed ten alternative configurations of the development. Pet. at p. 23. Then Pratt makes a logical jump and claims that it should not make any legal difference whether an agency's consideration of alternative proposals comes in the form of separate permit applications or in the form of consideration of multiple configurations in a single application. Pet. at p. 25.

Basically, Pratt is asserting that it should be excused from the finality requirement. The effect of Pratt's argument is that the courts would become the zoning boards and would have to determine the permissible scope of development of Pratt's property. Here, Pratt would have the courts determine in the first instance planning matters such as the size and configuration of the lots, the adequacy of water supply and the means of sewage disposal. Putting the courts in this role is contrary to this Court's requirement that landowners follow the "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion" in considering development of property. *Palazzolo*, *supra*, 533 U.S. at pp. 620-621. Here, neither the County nor the Commission has exercised their full discretion over development of Pratt's property.

Moreover, in making this argument, Pratt forgets that the alternatives analysis in an environmental impact report does not contain all the information that the Commission needs to determine whether the proposal is consistent with the LCP. Importantly

here, the alternatives analysis in the environmental impact report did not address the unresolved infrastructure issues regarding water supply and sewage disposal. No one could design a project without knowing how much water would be available or what sewage disposal method the Regional Board would approve. Pratt never supplied this essential information to the Commission.

Pratt's next argument is that because of the manner in which California law addresses coastal permits, Pratt may not have an opportunity to have the Commission review a redesigned project. Pet. at pp. 25-26. While that point is true, it is also trivial. Under the California Coastal Act, once the Commission certifies a local government's LCP, the State's coastal permitting authority is delegated to the local government. Cal. Pub. Resources Code § 30519, subd. (a). Some local government approvals of coastal permits are subject to appeal to the Commission, *id.* § 30603, but in the absence of an appeal, the Commission does not review locally-issued coastal permits. Therefore, if a local government approves a project, and no appeal is filed, the permit becomes final without the need for any Commission action.[3]

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[3] In its amicus brief, Matteoni, O'Laughlin & Hechtman asserts that the permit approval process that the Coastal Act created is unfair and that this Court should grant the petition to review that process. Matteoni Br. at p. 15. However, Pratt does not claim that the approval process was unfair or seek review of

(Continued on following page)

If Pratt were to apply to the County for a new project, there could be several outcomes. First, the County could approve Pratt's application. If no one appealed that decision to the Commission, Pratt would have a final permit authorizing its development project. If someone did appeal the County's approval to the Commission, the Commission also could approve a permit for Pratt giving it authorization to develop.

Second, if the County does not approve a permit for Pratt, Pratt could seek judicial review of that action. And if someone did appeal a County approval to the Commission and the Commission denied a permit, Pratt could seek judicial review of that action.

The fact that, if Pratt does apply again, these different outcomes exist does not mean that Pratt has a ripe takings claim against the Commission now. No governmental entity has made any final determination of the permissible uses of the Pratt property. And in the absence of a new permit application from Pratt, no governmental entity will be able to make any further determinations about the permissible uses.

Pratt also claims that Tract 1873 has been in the regulatory process for 30 years. Pet. at p. 27. As the Court of Appeal noted, that is not true. App. at p. 20. In the 1970s, Pratt applied to the County for a

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that process. Instead, Pratt wants to be excused from having to follow that process.

subdivision map for some of the property contained in Tract 1873. However, Pratt allowed the preliminary map to expire and did not pursue any development for that property for over a decade, that is, until it applied for a permit to subdivide Tract 1873. While Tract 1873 contains the property that was included in the earlier map, Tract 1873 also contains other property and was a completely new project. App. at p. 4. Thus it is not true that Tract 1873 has been in the regulatory process for 30 years.

Finally, this case is not like *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). In summarizing the situation in *Del Monte Dunes*, this Court stated, "After five years, five formal decisions, and 19 different site plans, . . . Del Monte Dunes decided that the city would not permit development of the property under any circumstances." *Id.*, p. 698. Here, Pratt has applied once for a permit to subdivide Tract 1873 and has been denied once. And in its denial, the Commission indicated a proposal that potentially could be approved – the Planning Commission-approved version of the project. However, in light of the unresolved issues regarding water supply and sewage disposal, the Commission was not in a position to take any action on that version of the project.

In sum, there are a variety of reasons why Pratt's takings claims are premature. After reviewing the record here, the Court of Appeal properly found that those claims were not ripe for review.

III. The Court Of Appeal Did Not Hold That The Absence Of Water On The Property Precluded A Taking.

Pratt's final argument is that the Court of Appeal justified the Commission decision by asserting the Commission had a valid basis for its decision. In this regard, Pratt singles out the Court of Appeal's comment that it was the lack of water on the property that caused Pratt harm. Pet. at pp. 18-21.

In making this argument, Pratt takes the Court of Appeal's comment out of context. First, the Court of Appeal stated that while the Commission concluded that this 41-unit subdivision was inappropriate, the Commission did not decide that it could not approve a less intense project. App. at p. 18. And the Court of Appeal noted that "Pratt has simply failed to demonstrate with sufficient certainty that its proposed 41-unit subdivision will have an adequate supply of water. Without such a demonstration, the extent of development . . . cannot be determined." App. at p. 19.

In looking at the record, the Court of Appeal observed, in dicta:

> Moreover, Pratt cites no authority that the denial of a development permit because of insufficient water supply constitutes a taking. Nor does Pratt cite authority that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. Even where the lack of water deprives a parcel owner of all economically beneficial use, it

> is the lack of water, not a regulation, that causes the harm.

App. at p. 19. The Court of Appeal made these comments in the context of determining that Pratt's takings claims were not ripe for judicial review. Notably, Pratt did not present any issue on this point in its petition seeking California Supreme Court review.

In any event, the Court of Appeal's comment merely reflects the reality about water supply in California. Water is scarce. Indeed, the California Constitution grants the Legislature great flexibility in determining how to protect this scarce resource. *In re Waters of Long Valley Creek System*, 599 P.2d 656, 663 (Cal. 1979); *see also Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 804 (1976) [most critical problem for the Southwest is the scarcity of water].

Finally, Pratt's complaint about lacking water is incongruous in light of what it told the trial court in opposing the Commission's motion seeking dismissal of Pratt's takings claims. In a declaration in opposition to the Commission's motion, Pratt's engineer stated:

> If the commission required on-site water service, this can be easily provided. . . . A previously drilled well which produced potable water . . . had been drilled many years ago and is located near lot 9 of Tract 1873. Such a well is capable of producing all the domestic water needs of the proposed project. . . .

6 Clerk's Transcript 1547, 1615-1616.

Pratt never presented this information to the Commission when it was considering Pratt's permit application. Indeed, Pratt presented no information to the Commission about the availability of water on the property. If Pratt applies for another coastal permit, presumably it will provide evidence on this subject because such evidence could alter the County's or the Commission's conclusions about the scope of permissible development on the property.

In any event, Pratt's claim now that the lower court cavalierly denied Pratt a trial on its takings claims based on the "rectitude of the regulatory purpose" (Pet. at p. 21) is a serious distortion the Court of Appeal's decision. And Pratt's argument ignores its own contentions in the trial court regarding water supply.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX "A"

California Public Resources Code

***Section 30514* Program amendment; commission certification; procedure; minor or de minimis amendments; amendments requiring rapid action; guidelines**

(a) A certified local coastal program and all local implementing ordinances, regulations, and other actions may be amended by the appropriate local government, but no such amendment shall take effect until it has been certified by the commission.

(b) Any proposed amendments to a certified local coastal program shall be submitted to, and processed by, the commission in accordance with the applicable procedures and time limits specified in Sections 30512 and 30513, except that the commission shall make no determination as to whether a proposed amendment raises a substantial issue as to conformity with the policies of Chapter 3 (commencing with Section 30200) as would otherwise be required by Section 30512. In no event shall there be more than three of these submittals of proposed amendments in any calendar year. However, there are no limitations on the number of amendments included in each of the three submittals.

(c) The commission, by regulation, shall establish a procedure whereby proposed amendments to a certified local coastal program may be reviewed and designated by the executive director of the commission as being minor in nature or as requiring rapid

and expeditious action. That procedure shall include provisions authorizing local governments to propose amendments to the executive director for that review and designation. Proposed amendments that are designated as being minor in nature or as requiring rapid and expeditious action shall not be subject to subdivision (b) or Sections 30512 and 30513 and shall take effect on the 10th working day after designation. Amendments that allow changes in uses shall not be so designated.

(d)(1) The executive director may determine that a proposed local coastal program amendment is de minimis if the executive director determines that a proposed amendment would have no impact, either individually or cumulatively, on coastal resources, is consistent with the policies of Chapter 3 (commencing with Section 30200), and meets the following criteria:

(A) The local government, at least 21 days prior to the date of submitting the proposed amendment to the executive director, has provided public notice, and provided a copy to the commission, that specifies the dates and places where comments will be accepted on the proposed amendment, contains a brief description of the proposed amendment, and states the address where copies of the proposed amendment are available for public review, by one of the following procedures:

(i) Publication, not fewer times than required by Section 6061 of the Government Code, in a newspaper of general circulation in the area affected by

the proposed amendment. If more than one area will be affected, the notice shall be published in the newspaper of largest circulation from among the newspapers of general circulation in those areas.

(ii) Posting of the notice by the local government both onsite and offsite in the area affected by the proposed amendment.

(iii) Direct mailing to the owners and occupants of contiguous property shown on the latest equalized assessment roll.

(B) The proposed amendment does not propose any change in land use or water uses or any change in the allowable use of property.

(2) At the time that the local government submits the proposed amendment to the executive director, the local government shall also submit to the executive director any public comments that were received during the comment period provided pursuant to subparagraph (A) of paragraph (1).

(3)(A) The executive director shall make a determination as to whether the proposed amendment is de minimis within 10 working days of the date of submittal by the local government. If the proposed amendment is determined to be de minimis, the proposed amendment shall be noticed in the agenda of the next regularly scheduled meeting of the commission, in accordance with Section 11125 of the Government Code, and any public comments

forwarded by the local government shall be made available to the members of the commission.

(B) If three members of the commission object to the executive director's determination that the proposed amendment is de minimis, the proposed amendment shall be set for public hearing in accordance with the procedures specified in subdivision (b), or as specified in subdivision (c) if applicable, as determined by the executive director, or, at the request of the local government, returned to the local government. If set for public hearing under subdivision (b), the time requirements set by Sections 30512 and 30513 shall commence from the date on which the objection to the de minimis designation was made.

(C) If three or more members of the commission do not object to the de minimis determination, the de minimis local coastal program amendment shall become part of the certified local coastal program 10 days after the date of the commission meeting.

(4) The commission, after a noticed public hearing, may adopt guidelines to implement this subdivision, which shall be exempt from review by the Office of Administrative Law and from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The commission shall file any guidelines adopted pursuant to this paragraph with the Office of Administrative Law.

(e) For purposes of this section, "amendment of a certified local coastal program" includes, but is not limited to, any action by a local government that authorizes the use of a parcel of land other than a use that is designated in the certified local coastal program as a permitted use of the parcel.

Section 30519 **Delegation of development review authority; recommendation of amendments to program**

(a) Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions with the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof.

(b) Subdivision (a) shall not apply to any development proposed or undertaken on any tidelands, submerged lands, or on public trust lands, whether filled or unfilled, lying within the coastal zone, nor shall it apply to any development proposed or undertaken within ports covered by Chapter 8 (commencing with Section 30700) or within any state university or college within the coastal zone; however, this

section shall apply to any development proposed or undertaken by a port or harbor district or authority on lands or waters granted by the Legislature to a local government whose certified local coastal program includes the specific development plans for such district or authority.

(c) The commission may, from time to time, recommend to the appropriate local government local coastal program amendments to accommodate uses of greater than local importance, which uses are not permitted by the applicable certified local coastal program. These uses may be listed generally or the commission may recommend specific uses of greater than local importance for consideration by the appropriate local government.